FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o [redacted]

DECISION
Case #: MGE - 174936

PRELIMINARY RECITALS

Pursuant to a petition filed on June 10, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Chippewa County Department of Human Services regarding Medical Assistance (MA), a hearing was held on July 12, 2016, at Chippewa Falls, Wisconsin. The records was left open for 79 days so that the parties could file briefs.

The issue for determination is whether the county agency correctly determined when the petitioner became eligible for Family Care Medical Assistance.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]
c/o [redacted]

Petitioner's Representative:

Attorney Peter E. Grosskopf
Grosskopf Law Office LLC
1324 West Clairemont Avenue, Suite 10
Eau Claire, WI 54701

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: Todd Pauls, Assistant Corporation Counsel
Chippewa County Office of Corporation Counsel
711 N. Bridge Street
Chippewa Falls, WI 54729-1877

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [redacted]) is a resident of Chippewa County.
2. The petitioner submitted an application for Family Care Medical Assistance Benefits dated April 28, 2016, that the county agency received on May 2, 2016.
3. The petitioner was financially eligible for Family Care when he applied.
4. The county agency determined that the petitioner was functionally eligible for Family Care on May 18, 2016.
5. The county agency eventually determined that the petitioner was eligible for Family Care as of May 18, 2016. The petitioner seeks eligibility retroactive to April 28, 2016.

DISCUSSION

The petitioner seeks Family Care Medical Assistance Benefits, a medical assistance waiver program that provides appropriate long-term care services for elderly or disabled adults. Wis. Stat. § 46.286; *see also* Wis. Admin. Code, Chapter DHS 10. There were once a number of issues in dispute, but the parties resolved all but one: whether the petitioner's eligibility should begin on April 28, 2016, the date he applied and was later determined to have been financially eligible, or May 18, 2016, the date the county agency completed the functional screen and determined he was functionally eligible for the program.

To be eligible, a person must meet the program's financial and non-financial criteria, including functional criteria. Wis. Admin. Code, §§ DHS 10.32(1)(d) and (e). The agency has 30 days from the date it receives a signed application with the applicant's name and address to determine eligibility. Wis. Admin. Code, § DHS 10.31(6)(a). Once a person meets all of the program's eligibility criteria, he is "entitled to enroll in a care management organization and to receive the family care benefit." Wis. Admin. Code, § DHA 10.36(1). As stated in Wis. Admin. Code, § DHS 10.41(1), "The family care benefit is available to eligible persons only through enrollment in a care management organization (CMO) under contract with the department."

Strictly applying these regulations can lead to harsh results. With many entities involved—local agencies, the ADRC, and the CMO—applications sometimes get lost in the shuffle and the chance for error increases. When this happens, the potential recipient, through no fault of his own, does not receive benefits he is entitled to and must find his own financing for things such as nursing care and adult family homes. Because Family Care benefits are not retroactive, stringently applying the regulation that allows benefits only to those actually enrolled in a CMO does not allow the department or the Division of Hearings and Appeals to correct any error that might occur somewhere in the application process by paying for services the applicant has already received and was eligible for. The Division of Hearings and Appeals has issued a number of decisions upholding this type of result because it lacks equitable powers that would allow it to consider the fairness of the situation. *See, e.g., DHA Decision No. FCP/163632.*

In the last year, the department has issued some final decisions that mitigate the harshness of this interpretation. Although the department's final decisions are not binding on the Division of Hearings and Appeals, the division generally gives them significant weight and deference. Last month the department issued *Final Decision No. FCP/173457,* which the petitioner's attorney cited in his reply brief. In that matter, the agency incorrectly calculated the applicant's assets, which led to an incorrect denial of Family Care benefits. The final decision reversed the denial and found the applicant eligible back to the date of his second application. In doing so, it held: "Although there is no retroactive enrollment in the Family Care program, enrollment as of the date established in correction of an agency error is necessary and appropriate."

Another final decision, this one modifying a decision the Division of Hearings and Appeals issued last October, found that enrollment in a CMO can begin "effective the actual date on which an individual completed an enrollment form and meets all eligibility and entitlement criteria, even if that date is earlier than the date on which the agency completes all its calculations/verifications and verifies the individual has met all financial and non-financial eligibility criteria." *Final Decision No. FCP167655.* As an example, it noted that if a "person was determined to be functionally eligible on January 1st and also completed the MA application and the Family Care Enrollment form on January 1st, but the agency finishes its eligibility determination on February 5, 2015, and verifies the person met all financial, non-financial eligibility criteria as of January 2st, there is nothing that precludes enrolling the person effective January 1st."

There are three points to take from this decision. First, enrollment can begin before the date the CMO actually accepts the person into the program. The department noted that in these instances, the CMO could receive capitation payments to cover the cost of the service it provided before the person was formally accepted into the program. Of course, if the applicant loses his appeal, he may be responsible for those costs. The second point is that financial eligibility does not depend upon the date the applicant proves that he is financially eligible but rather on the date he actually met the financial requirements. Thus, if he had to reduce his assets to below $100,000 to be eligible, and his assets fell below this amount on January 1st, but he didn't verify this until March 1st, he would be financially eligible for the program on January 1st. Third, functional eligibility begins on the date a functional screen establishes that the person is functionally eligible. This is established by the language in *Final Decision No. FCP167655* that makes eligibility dependent on the date the person was determined to be functionally eligible." This refers to the date that the determination was made. If the department had meant for functional determinations to consider the person's functional ability before it was determined, the language would clearly state this as it did when referring to financial eligibility.

This last point is important because it determines the outcome of the petitioner's matter. His attorney argues that functional eligibility can begin before the functional capacity screen actually provides a result showing that the petitioner meets this criterion. He relies on the fact that a provision stating that the date of an applicant's first request is considered to be "the date a functional screen was completed and the person was determined functionally eligible" was not added to the *Medicaid Eligibility Handbook,* § 18.4.2., until June 24, 2016, Because it was added after the petitioner sought Family Care, he contends it does not apply to his eligibility determination. The change, he argues, "was clearly significant, otherwise why bother making the change?"

His argument overlooks that policy is not law but rather an interpretation of law that provides guidance to agency workers and others. Because it interprets law, a policy change does not necessarily mean that the department is changing the rules; instead the policy may be changed to better reflect laws that were already in place. As *Final Decision No. FCP167655* shows, the department was already interpreting Wis. Admin. Code, Ch. 10, as requiring that a finding of functional eligibility must exist before eligibility and benefits can begin.

There is a rational basis for treating financial and functional eligibility differently. A functional capacity determination provides a snapshot of how one functions on the date of the evaluation. The way one functions on that date does not necessarily mean that the person functioned that way on some earlier date. Although one can review older medical records and ask the person how he functioned in the past, this requires a more subjective and complicated determination than determining his current level of functioning, which is done primarily by asking him and those close to him how well he performs a number of basic tasks. Memory is a tricky thing, and even the most honest people are subject to lapses when those lapses are in their interest. Thus, if a person's past eligibility depends upon not being able to function at a particular level at that time, there is good chance he is going to remember that his ability to

function then was similar to what it is now, even if he has deteriorated in this period. Retroactive functional determinations are more complicated because they would require a more in depth look at past medical records. Financial determinations are different because there is usually clear, accurate, and adequate documentation available to determine a person's financial situation with precision on any particular past date. Based upon this, I find that Family Care eligibility cannot begin before the applicant is functionally eligible and that this was how benefits were determined back when the petitioner applied. This means that his eligibility cannot begin before May 18, 2016, the date the county agency would allow it to begin.

The petitioner's attorney also contends that Wisconsin law not allowing retroactive benefits violates federal law requiring states to make medical assistance services available up to three months before the person applied, if the person would have been eligible for the services during this period. *See* 42 USC § 1396a(a)(34). He contends that the federal district court for Southern Ohio overturned a provision in an Ohio law similar to Wisconsin's Family Care law that barred retroactive eligibility. The case he cited, *Price v. Medicaid Director,* 1:13-CV-74, is a decision by a federal magistrate certifying as a class those challenging the law barring retroactive benefits. The county's attorney contends that this decision is not persuasive here because the court making the decision, unlike Wisconsin, is outside the Seventh Circuit. He also points out that the decision is being appealed. This misconstrues what persuasive authority is. Persuasive authority can come from any published decision anywhere in the country. It differs from binding authority in that if a court disagrees with the decision that is not binding, the court is not bound to follow it. Instead, persuasive authority depends entirely upon how well the logic of the decision persuades the tribunal considering it. Thus, this decision could be considered persuasive authority. But whatever persuasive power it has must be argued to a state or federal judge because, as an administrative law judge, I have no power to overturn Wisconsin's laws, including administrative code provisions. Although the petitioner challenges the validity of these provisions, he does not challenge that, as written, they bar retroactive benefits. Because I am bound by Wisconsin's law concerning Family Care Medical Assistance, and that law does not allow retroactive benefits, I cannot grant retroactive benefits.

CONCLUSIONS OF LAW

The county agency correctly determined that the petitioner cannot become eligible for Family Care until he has been determined to be functionally eligible for the program.

THEREFORE, it is **ORDERED**

The petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 17th day of October, 2016

\s_____
Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on October 17, 2016.

Chippewa County Department of Human Services
Division of Health Care Access and Accountability
Attorney Peter Grosskopf